No . 25-1131

IN THE
Supreme Court of the United States

MISSIONARIES OF SAINT JOHN THE BAPTIST, INC.

Petitioner,

v.

JOEL FREDERIC, ET UX.,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF OF THE NATIONAL ASSOCIATION OF EVANGELICALS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, and ministries in the United States. NAE serves approximately 40 evangelical denominations and thousands of churches, ministries, and nonprofit organizations nationwide. For more than 80 years, NAE has united evangelicals to promote religious liberty. It has participated as *amicus curiae* in cases concerning religious freedom, including *Holt v. Hobbs*, 574 U.S. 352 (2015), and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). NAE's current legal counsel, Professor Carl H. Esbeck, played a significant role in the Senate's enactment of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc to 2000cc-5.

Although NAE is evangelical and Petitioner Missionaries of Saint John the Baptist, Inc. ("St. John") is Catholic, the rule the Court announces here will govern houses of worship of every faith. NAE's member churches build sanctuaries, baptisteries, prayer gardens, and outdoor worship spaces. Few are "required" by doctrine, and almost any could be built

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

smaller. If a court may find no substantial burden because the claimant could build smaller, or elsewhere, every one of those structures is at risk. NAE therefore has a strong interest in ensuring that RLUIPA applies to the "use, building, or conversion of real property" the claimant actually proposes, 42 U.S.C. § 2000cc-5(7)(B), not to a smaller or relocated version that a court considers sufficient.

SUMMARY OF ARGUMENT

The Kentucky Supreme Court agreed that building the grotto, a shrine honoring the Virgin Mary's appearance at Lourdes, "constitutes a religious exercise." Pet. App. 22a. It nevertheless found no substantial burden because St. John could build "a smaller shrine or grotto than what it desires," had shown no expenses caused by the Board, and "had every reason to know" that the ordinance did not permit the grotto. *Id.* at 25a–27a. Each reason shifts the inquiry from the government's prohibition to the claimant's options, costs, and knowledge. But at the threshold, RLUIPA asks only whether the government substantially burdened the exercise the claimant proposed.

First, RLUIPA tells courts what to measure. "Religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). "The use, building, or conversion of[, in this case, church-owned] real property for the purpose of religious exercise" is itself religious exercise. *Id.* § 2000cc-5(7)(B). The

inquiry therefore asks what the government did to the exercise the claimant proposed. Here, that exercise is a grotto built into the hillside on land St. John acquired for that purpose, beside its existing church. *See* Pet. App. 3a–4a, 8a n.6. A regulation forbidding that exercise outright is the paradigm of a substantial burden in this Court's cases. RLUIPA's sponsors told courts to read "substantial burden" "by reference to Supreme Court jurisprudence." 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) [hereinafter Joint Statement].

Second, this Court has already construed RLUIPA's operative language, and that reading does not change at the property line. RLUIPA's land-use and institutionalized-persons provisions both prohibit a "substantial burden" on "religious exercise," and a single statutory definition governs both. 42 U.S.C. §§ 2000cc(a)(1), 2000cc-1(a), 2000cc-5(7). In the same Act, Congress amended the Religious Freedom Restoration Act ("RFRA") to adopt that definition. *See* 42 U.S.C. § 2000bb-2(4).[2] This Court has applied the definition uniformly: to a family business and to a prisoner's beard.[3] In each case, the Court identified the exercise as the claimant defined it, not some substitute. *Holt* said so directly. The inquiry asks whether the government substantially burdened the claimant's religious exercise, "not whether the RLUIPA

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[2] *Hobby Lobby*, 573 U.S. at 695–96.

[3] *See Holt*, 574 U.S. at 361–62 (beard); *Hobby Lobby*, 573 U.S. at 719–26 (family business).

claimant is able to engage in other forms of religious exercise."[4] NAE supports the rule Petitioner urges. A land-use regulation substantially burdens religious exercise when, as implemented, it "pressures claimants to forgo or materially alter the use or development of their property for a specific, sincere religious exercise," and a complete prohibition on a particular religious use of a specific parcel is the clearest case. Pet. Br. 18–19, 26–27. Whether the claimant could conduct the activity on other property is irrelevant at that threshold. *Id.* at 19, 23–24.

Third, the Kentucky Supreme Court inverted the statute's order. RLUIPA does not make alternatives irrelevant; it assigns them a place. Once a claimant shows a substantial burden, the government must prove that its action is the least restrictive means of furthering a compelling interest. 42 U.S.C. §§ 2000cc(a)(1), 2000cc-2(b). Whether something short of total prohibition (a smaller grotto, conditions on use, or traffic measures) would serve the government's interests is a question for that stage, where the government bears the burden. Here, the court below moved that question to the threshold and made St. John answer it.

Fourth, knowing the law cannot make a burden self-imposed. RLUIPA protects religious institutions that must seek permits and variances under systems of individualized assessment. 42 U.S.C. § 2000cc(a)(2)(C). Every such applicant knows its use is

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[4] *Holt*, 574 U.S. at 361–62.

not permitted by right; that is why it applies. That knowledge is a precondition of applying, not a waiver of RLUIPA. St. John followed the process RLUIPA contemplates, and after a public hearing the Board of Adjustment approved the grotto, 4–1. Pet. App. 8a–9a.

Fifth, the rule is limited. A claimant must still show that its proposed use is religious, that it is grounded in sincere belief, and that the regulation, as implemented, pressures it to forgo or materially alter that use. The Court should hold that St. John has shown a substantial burden, vacate the judgment, and remand for further proceedings.

INTRODUCTION

For almost a century, worshippers have come to pray in the same church on Amsterdam Road in Park Hills, Kentucky. Pet. App. 33a–34a (Thompson, J., dissenting), 59a. The church was constructed in 1930, before Park Hills had a zoning code, and it remains a lawful nonconforming use. *Id.* at 33a (Thompson, J., dissenting), 48a & n.3, 59a, 87a. Today it is home to the Catholic parish of Our Lady of Lourdes. *Id.* at 4a. The parish takes its name from Lourdes, a town in the French Pyrenees where, in 1858, a fourteen-year-old girl named Bernadette Soubirous reported that the Virgin Mary appeared to her in a grotto.

St. John wanted a grotto of its own. It proposed a grotto built into the hillside beside the church, with a small plaza and "space for reflection and repose," for parishioners to use "primarily before and after mass."

J.A. 7–8. It scaled the plan back on its own before the Board ever voted. Pet. App. 27a.

St. John did not try to slip anything past the city. Its letter said that the grotto was "not directly permitted," so it asked for a conditional-use permit and setback variances. J.A. 8–9. County planning staff found the grotto "a desirable accessory use to the church" but recommended denial because the street is not arterial. Pet. App. 122a, 124a–25a. The Board of Adjustment held a public hearing and approved the grotto, 4–1, finding that it would not "be detrimental to the health, safety, or general welfare" of those nearby. *Id.* at 8a–9a. As the Board required, St. John then took title to the lot. *Id.* at 8a–9a & n.6.

Two neighbors, Joel and Elizabeth Frederic, sued to undo the approval. The circuit court upheld it. *Id.* at 59a, 61a. The Court of Appeals reversed, holding that the ordinance did not allow the Board to approve the grotto. *Id.* at 41a, 49a–50a. The Kentucky Supreme Court reviewed only St. John's RLUIPA defense, and it affirmed. *Id.* at 16a–17a, 30a. The court agreed that building the grotto is religious exercise. *Id.* at 22a. But it held that losing the grotto was "a mere inconvenience," because St. John could build something smaller, and that St. John "had every reason to know" the ordinance stood in its way. *Id.* at 25a, 27a.

So a parish that followed the process and won still lost its shrine, and RLUIPA gave it no help because a court decided a smaller one would do. This

case asks whether a court may decide how much of a shrine a faith needs. The court below asked how little St. John could live with. RLUIPA asks how much the government can justify.

ARGUMENT

I. RLUIPA Measures Substantial Burden by What the Government Does to the Claimant's Specific Religious Exercise.

A. RLUIPA safeguards the religious use a claimant proposes, not the substitute a court prefers.

RLUIPA bars any land-use regulation that "imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution," unless the burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc(a)(1). "Religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). And "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property *for that purpose*." *Id.* § 2000cc-5(7)(B) (emphasis added).

Subsection (B) makes building a structure for a religious purpose an exercise of religion in its own right. The protected exercise is not "worship" in the

abstract. Statutory terms carry their ordinary meaning at enactment,[5] and in ordinary usage, "building" on "real property for the purpose of religious exercise" refers to a particular structure on a particular parcel. Building a grotto on the adjacent lot is thus one religious exercise. Building a smaller shrine on St. John's existing lot is another. And any doubt is resolved by Congress's command that RLUIPA "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).[6]

The point is strongest when a structure's form carries religious meaning. St. John designed its grotto to honor the Virgin Mary's appearance at Lourdes, France. Pet. App. 4a, 22a. For such a structure, size and form are part of the exercise, not packaging around it.

A house of worship's "physical appearance, both exterior and interior, may be a channel for communicating its religious belief."[7] Victor Hugo wrote that, until the age of print, "[a]rchitecture is the great book of humanity."[8] A court that tells a congregation its shrine could be smaller is, in Hugo's terms, editing the

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[5] *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020).
[6] *See Hobby Lobby*, 573 U.S. at 696.
[7] Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929, 958 (2001).
[8] Victor Hugo, *Notre-Dame de Paris*, bk. V, ch. 2 (Isabel F. Hapgood trans., 1888) (1831).

book. No secular standard tells a court how large a shrine to the Virgin must be, or where it must stand. Those are "religious judgments about the meaning or relative significance of beliefs or practices within a particular tradition," including "the need for particular architectural features in a house of worship."[9] A court may not resolve them by overriding the claimant's account of its own faith.[10]

The Kentucky Supreme Court quoted the definition and accepted that building the grotto "constitutes a religious exercise." Pet. App. 22a. It then decided how much of that exercise St. John needed and ignored the belief and intent behind the project. That approach reads part of the definition out of the statute. If a court may ask whether a smaller version would suffice, the words "whether or not compelled by, or central to" do no work. The court is asking, by another route, whether the full project is necessary. "[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[11] The word

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[9] Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 Cardozo L. Rev. 1907, 1927 (2011); *see id.* at 1929 (explaining that religious judgments cannot easily be avoided when the claimant asserts that a particular site, size, or accessory use is religiously significant).

[10] *See Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1069 (9th Cir. 2011) (reversing a district court's "flat rejection of the Church's characterization of its core beliefs").

[11] *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

"substantial" still matters. It filters out trivial impositions but does not license the necessity inquiry that the definition forbids.

B. Prohibiting the proposed exercise is a substantial burden.

This Court has found a substantial burden even in indirect pressure; a regulation forbidding St. John's proposed use necessarily imposes one. "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."[12] That jurisprudence, to which Congress tied RLUIPA's standard, has never confined substantial burdens to outright prohibitions.[13]

"A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion."[14] Applying RLUIPA's identically worded institutionalized-persons provision, *see infra* Part I.C, then-Judge Gorsuch explained that a burden is substantial "when (at the very least) the government . . . prevents the plaintiff from participating in an activity motivated by a sincerely held religious

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[12] *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981).

[13] *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (denial of benefits imposes "the same kind of burden . . . as would a fine"); *Hobby Lobby*, 573 U.S. at 691 ("If these consequences do not amount to a substantial burden, it is hard to see what would.").

[14] *Emp. Div. v. Smith*, 494 U.S. 872, 893 (1990) (O'Connor, J., concurring in the judgment); *see id.* at 898–99 (O'Connor, J., concurring in the judgment) (a criminal prohibition "is, if anything, more burdensome" than a condition on a state benefit).

belief."[15] In *Yellowbear*, the prison's policy fell "easily within" the category of "flatly prohibiting" the claimant from religiously motivated activity, so the court did not need to "inquire into the degree of the government's coercive influence."[16] The same is true of a decision forbidding a church to build the Marian shrine it proposes on its own property. Whether the church might build a smaller shrine is a question for the least-restrictive-means stage. *See infra* Part II.A.

Nor may a court second-guess which exercise the claimant chooses, any more than where it draws the line of belief. In *Hobby Lobby*, the government's attenuation argument "dodge[d] the question that RFRA presents," whether the mandate imposed a "substantial burden," and instead addressed "a very different question that the federal courts have no business addressing," namely whether the religious belief "is reasonable."[17] The courts' "narrow function . . . is to determine" whether the line drawn reflects "an honest conviction."[18] "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith."[19] Section 2000cc-5(7)(A) wrote that limit into the statute, and *Holt* applied it, explaining

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[15] *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.) (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)).
[16] *Id.* at 56.
[17] *Hobby Lobby*, 573 U.S. at 724.
[18] *Id.* at 725 (quoting *Thomas*, 450 U.S. at 716).
[19] *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

that RLUIPA "applies to an exercise of religion regardless of whether it is 'compelled.'"[20]

"Substantial" does go to degree, but the question is how heavily the government burdened the exercise the claimant proposed, not how much of the claimant's religious life remains untouched. *Holt* measured the burden on a prisoner's religious exercise, a half-inch beard, not on his ability to practice Islam in other ways.[21] "The term 'substantial,' after all, doesn't mean complete or total."[22] A fortiori, a total prohibition of the proposed exercise is a substantial burden. *Lyng* is not to the contrary. It rejected a challenge to the government's management of "what is, after all, its land," and it recognized that "a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions."[23]

C. RLUIPA and RFRA share one definition of religious exercise, and this Court has consistently applied it without asking whether a substitute would do.

RLUIPA "imposes the same general test as RFRA but on a more limited category of governmental actions," and it amended RFRA to import RLUIPA's

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[20] *Holt*, 574 U.S. at 362.
[21] *Id.* at 361–62.
[22] *Yellowbear*, 741 F.3d at 55.
[23] *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988) (emphasis omitted).

definition.[24] RFRA's "exercise of religion" therefore "must be given the same broad meaning that applies under RLUIPA."[25] *Holt* called RFRA RLUIPA's "sister statute" and explained that § 2000cc-1, which "mirrors RFRA," allows prisoners "to seek religious accommodations pursuant to the same standard as set forth in RFRA."[26]

The Court has applied that one definition, with no inquiry into centrality or substitutes, to a closely held corporation and to a prisoner's beard.[27] Even the principal *Hobby Lobby* dissent agreed that RLUIPA's amendment "clarifies that courts should not question the centrality of a particular religious exercise."[28]

One set of words cannot mean one thing in some applications and another elsewhere. "To give these same words a different meaning for each category would be to invent a statute rather than interpret one."[29] A court therefore cannot read RLUIPA's

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[24] *Hobby Lobby*, 573 U.S. at 695–96.
[25] *Id.* at 696 n.5 (citing 42 U.S.C. § 2000bb-2(4)).
[26] 574 U.S. at 356–58 (quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006)).
[27] *See Holt*, 574 U.S. at 361–62; *Hobby Lobby*, 573 U.S. at 720–24 (rejecting the argument that the companies could avoid the burden by dropping coverage).
[28] 573 U.S. at 748 (Ginsburg, J., dissenting). The dissent added that courts must still "inquire whether a government action substantially burdens a religious exercise" and that Congress "meant the modifier 'substantially' to carry weight." *Id.* at 748, 758. NAE agrees; Petitioner's rule keeps that inquiry and screens out trivial burdens.
[29] *Clark v. Martinez*, 543 U.S. 371, 378 (2005).

definition of religious exercise one way for a corporation or a prisoner and another way for a church. Yet the court below, following *Livingston Christian Schools v. Genoa Charter Township*, 858 F.3d 996, 1003–04 (6th Cir. 2017), measured the burden against a smaller shrine on another lot, holding that St. John's "ability to build a smaller shrine or grotto than what it desires" made the denial "a mere inconvenience." Pet. App. 25a.

That prisons and land use differ does not change the answer. The Third Circuit recognized that the two provisions are "not identical" yet treated the prison standard as a "reference point" for land use.[30]

The Fourth Circuit, declining to require the pressure-to-violate-beliefs showing used in prison cases, reasoned that requiring a religious organization to prove that a land-use regulation pressured it to violate its beliefs "would be tantamount to eliminating RLUIPA's substantial burden protection in the land use context."[31] Petitioner's rule meets that concern. As Petitioner explains, no such proof is required, and certainly not where the government forbids the exercise itself. Pet. Br. 19, 21–22.

Livingston's own reasoning confirms that alternatives belong after the burden finding. It declined to

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[30] *Anash, Inc. v. Borough of Kingston*, 184 F.4th 214, 237 (3d Cir. 2026).

[31] *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 555 (4th Cir. 2013) (quoted in *Anash*, 184 F.4th at 237 n.18).

follow the framework of an earlier Sixth Circuit case, including its "effectively bar" prong, which asked whether government action would "effectively bar a religious institution from using its property in the exercise of its religion."[32] Under that prong, the court reasoned, "any time that a land-use regulation completely barred the religious use of a property, a substantial burden would automatically exist."[33] But a burden finding is not an "automatic exemption."[34] It triggers strict scrutiny, which the government may still satisfy. 42 U.S.C. § 2000cc(a)(1). *Livingston* itself recognized the proper analytical sequence, reserving certain questions for an inquiry that "the court should undertake only after finding that a substantial burden exists."[35] Yet the first factor in its threshold test asks whether the institution "has a feasible alternative location from which it can carry on its mission."[36]

Petitioner's rule does not depend on whether an exercise is tied to its site. But even courts that weigh alternatives at the threshold recognize that a substitute site cannot defeat a burden on an exercise rooted in place. The school in *Livingston* could carry on the same mission 12.1 miles away and identified no "religious activity . . . that could not be performed" at the

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[32] *Livingston*, 858 F.3d at 1002 (quoting *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 737 (6th Cir. 2007)).
[33] *Id.* at 1003.
[34] *Cf. id.* (quoting *Andon, LLC v. City of Newport News*, 813 F.3d 510, 516 (4th Cir. 2016)).
[35] 858 F.3d at 1005.
[36] *Id.* at 1004.

property it already owned.[37] Even so, *Livingston* itself recognized that a mission tied to a particular place "might be thwarted by relocating."[38] The Sixth Circuit itself has since rejected a proposed substitute, at the preliminary-injunction stage, because the other church "lacks a secluded prayer trail on a wooded, 40-acre parcel of land."[39] A grotto built to honor the apparition at Lourdes, on the institution's own property next to its church (Pet. App. 4a, 8a n.6, 22a), is tied to its site and form in the same way.

D. The Court should adopt Petitioner's rule.

These principles support the rule Petitioner urges. Pet. Br. 26–27. The burden is measured against the exercise the claimant actually proposes. Whether a smaller or relocated project would serve the government's interests belongs to the government's least-restrictive-means showing. *See* 42 U.S.C. §§ 2000cc(a)(1)(B), 2000cc-2(b).

The rule is also narrow here. This case presents its clearest case, a flat prohibition of the proposed use, and the Court need not decide when conditions, delay, or expense become substantial. Nor does the rule make every permit denial a substantial burden. The

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[37] *Id.* at 1008–09.

[38] *Id.* at 1012.

[39] *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp.*, 82 F.4th 442, 450 (6th Cir. 2023); *see id.* at 449–50 (likely substantial burden where township required a special-use permit to retain, and ordered removal of, an altar, Stations of the Cross, and a mural on a prayer trail).

claimant must show that the feature the government forbids is itself religious exercise, sincerely held.

This case also does not present a size limit on a use the parcel otherwise allows. And even judged by degree, forcing a church to build a much smaller version of its shrine on a different lot, here a strip of roadside lawn, would be substantial. *See* Pet. Br. 35–36, 41–42. St. John's grotto is the exercise, as the court below agreed. Pet. App. 22a. The inquiry turns on "the coercive impact of the government's actions," not "the relative importance of the religious exercise."[40] Even where the government permits a lesser version of the exercise, any change in the "relative strength of the parties' positions" will "reveal itself at later stages in the doctrinal analysis."[41]

E. The legislative history confirms this reading.

RLUIPA's Senate sponsors, Senators Hatch and Kennedy, explained the Act in a joint statement on which this Court has relied in construing it. *See Cutter v. Wilkinson*, 544 U.S. 709, 716–17, 723 (2005). That statement supports Petitioner's rule in four respects.

First, Congress did not write a new burden standard, and the Act's sponsors told courts where to find one. The Act omits a definition of "substantial

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[40] *Yellowbear*, 741 F.3d at 55.
[41] *Id.* at 64.

burden" "because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise."[42] Instead, the term "should be interpreted by reference to Supreme Court jurisprudence."[43] That reference governs how heavy a burden must be. *See* Pet. Br. 24–25. It does not govern what counts as religious exercise, which Congress defined separately and which this Court has read as "an obvious effort to effect a complete separation from First Amendment case law."[44] The sponsors also cautioned that, despite the broad-construction clause, "[t]he term 'substantial burden'" should receive no "broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise."[45] Whatever that caution meant for "religious exercise," it cannot narrow the definition Congress enacted, which this Court has read together with § 2000cc-3(g).[46] Petitioner's rule seeks nothing broader. This Court's cases treat a law that forbids the claimant's exercise as the clearest burden of all. *See supra* Part I.B.

Second, Congress made the use of property itself the protected exercise. The sponsors explained that the definition "includes the 'use, building, or conversion' of real property for religious exercise."[47] The House Judiciary Committee, reporting a predecessor

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[42] Joint Statement at S7776.
[43] *Id.*
[44] *Hobby Lobby*, 573 U.S. at 696.
[45] Joint Statement at S7776.
[46] *Id.*; *see Hobby Lobby*, 573 U.S. at 696.
[47] Joint Statement at S7776.

bill, said the same thing. "[B]uilding a church, or otherwise using real property for religious purposes, is religious exercise."[48] The same report explained that "the burdened religious activity need not be compulsory or central to a religious belief system as a condition for the claim."[49] A court that asks whether a smaller shrine would suffice asks the centrality question in another form.

Third, Congress built the Act on a record of discretionary land-use decisions. The sponsors reported that "new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation."[50] That discrimination often "lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'"[51] A threshold test that lets a court decide how much of a shrine a congregation needs restores the discretion Congress set out to discipline.

Fourth, Congress placed the burden of justification on the government. The sponsors adopted RFRA's standard. "[I]f government substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means."[52] Once

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[48] H.R. Rep. No. 106-219, at 30 (1999).
[49] *Id.* at 13.
[50] Joint Statement at S7774.
[51] *Id.*
[52] *Id.*

a claimant proves a substantial burden, "the government shall bear the burden of persuasion" on both elements.[53] The claimant proves the burden itself. Nothing in the statement asks it to prove, at the threshold, that a smaller project would not do.

II. The Kentucky Supreme Court Inverted the Statutory Inquiry.

RLUIPA also settles who must answer, and when. The government must justify a substantial burden, 42 U.S.C. § 2000cc-2(b), but the court below asked St. John, at the threshold, whether a smaller grotto would do and whether it should have foreseen the denial.

A. Whether a smaller grotto would do belongs to the least-restrictive-means inquiry.

The court below did not identify a smaller version of St. John's grotto, but a different project. It pointed to another structure, on land St. John already owned rather than the parcel the Board required it to acquire. Pet. App. 25a; *see id.* at 8a & n.6. Faulting St. John for never asserting that it "could not construct a smaller grotto or shrine," the court held that St. John's "ability to build a smaller shrine or grotto" fell "more into the category of a mere inconvenience than a burden with 'some degree of severity.'" Pet. App. 25a. It weighed that option under *Livingston*'s

[53] *Id.* at S7776.

"feasible alternative location" factor. *Id.* at 24a–26a. But where the government forbids the proposed use outright, any alternative matters only to means, which RLUIPA reserves for the second stage, where the government bears the burden. *See* 42 U.S.C. § 2000cc-2(b). The Third Circuit has so held, in a preliminary-injunction appeal. Plaintiffs "did not need to disprove the feasibility of alternative locations for the exercise of their religion in order to show that their exercise of religion was substantially burdened."[54]

Once the claimant makes a prima facie case, "the government shall bear the burden of persuasion on any element of the claim," save the threshold burden question. 42 U.S.C. § 2000cc-2(b). The least-restrictive-means standard is "exceptionally demanding."[55] It requires the government to show "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]."[56] And "if a less restrictive means is available for the Government to achieve its goals, the Government must use it."[57]

Holt shows how the inquiry runs. The Court weighed the alternatives (searching the claimant's beard, and photographing him with and without it) against the State's interests, and it held the State to

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[54] *Anash*, 184 F.4th at 245.
[55] *Holt*, 574 U.S. at 364 (quoting *Hobby Lobby*, 573 U.S. at 728).
[56] *Id.* at 364–65 (quoting *Hobby Lobby*, 573 U.S. at 728).
[57] *Id.* at 365 (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000)).

its burden.[58] The Court asked whether the prison could meet its goals with less. It never asked whether the claimant could make do with a shorter beard. The court below asked the reverse. It asked whether St. John could live with less, never whether Park Hills could. That is the inversion.

The record shows why the order matters. The Board found that the grotto would not "be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity." Pet. App. 9a. Respondents themselves faulted the Board for failing to "implement or consider mitigation measures," including "a reduction in scope of the construction, lighting and noise restrictions, and a limitation on the hours the facility could be used." Pet. App. 108a (Compl. ¶ 29); *see* J.A. 31 (Frederic Aff. ¶ 10). In a joint filing with the Board, St. John told the trial court that it and the City had "agreed to undertake other measures" to address any overflow parking, and that those measures "were rejected." Pet. App. 95a–96a. In the Kentucky Supreme Court, respondents cited the Frederic affidavit only to argue that St. John could build elsewhere. *See* J.A. 116. Measures like these are the stuff of least-restrictive-means analysis. In *Westchester*, the zoning board failed that test because it "had the opportunity to approve the application subject to conditions, but refused to consider doing so."[59] Here, no court ever weighed such measures, because

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[58] *Id.* at 364–67, 369.

[59] *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 353 (2d Cir. 2007).

St. John's claim ended at the threshold. Inverting the inquiry shifted the burden of proof, and on this record that decided the case.

Respondents read *Westchester* to defeat a burden whenever the claimant may try again. Br. in Opp. 14–15. But no application can succeed here, because the Court of Appeals held that the ordinance bars any grotto, large or small, on that land. Pet. App. 48a–50a. Respondents will also rely on cases holding that size limitations did not substantially burden a church that could still build a smaller building for the same purpose.[60] Whatever their merit under Petitioner's test, *see* Pet. Br. 26–27, 41–42, those cases did not involve a prohibition. In each, the religious use could still proceed, at a smaller scale, on the same parcel. Judge Clay drew that line in *Catholic Healthcare*. The regulation in *Living Water*, he explained, "related only to the size of the building," while the township barred the religious displays "at all."[61] And even in *Canaan*, Judge Richardson recognized that "the category of 'burdens' must cover more than bans."[62] Here, St. John may not build its grotto on the chosen parcel at

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[60] *See Living Water*, 258 F. App'x at 739; *Canaan Christian Church v. Montgomery Cnty.*, 29 F.4th 182, 193–94 (4th Cir. 2022) (after the county denied public sewer service, its study found that an 800-seat church "could probably be operated" on the property using septic; the congregation sought 2,000 seats).

[61] 82 F.4th at 453–54 (Clay, J., concurring).

[62] 29 F.4th at 199 n.1 (Richardson, J., concurring in the judgment).

all. A smaller shrine on another lot is a substitute, and substitutes belong at strict scrutiny.

And respondents invoke Maryland's test, under which a regulation substantially burdens religious exercise "only if it leaves the aggrieved religious institution without a reasonable means to observe a particular religious precept."[63] That test requires a court to name the precept and then decide which means of observing it are reasonable. RLUIPA forbids both steps. Section 2000cc-5(7)(B) makes the use of the property itself the exercise, and § 2000cc-5(7)(A) protects that exercise whether or not any precept compels it.

B. Knowing that a use requires approval does not make the burden self-imposed.

The court below also held that St. John's burden was self-imposed because St. John "had every reason to know, and in fact explicitly acknowledged, that building the grotto was not permitted by the ordinance." Pet. App. 27a. That reasoning cannot be squared with the statute's reach. RLUIPA's land-use provision applies when a burden is imposed under a system that permits "individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2)(C). (That provision is not the Act's only jurisdictional basis. *See id.* § 2000cc(a)(2)(B).) Every applicant for a conditional use

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[63] *Br. in Opp. 19, 25–26 (quoting Trinity Assembly of God of Balt. City, Inc. v. People's Couns. for Balt. Cnty.*, 407 Md. 53, 96, 962 A.2d 404, 429 (2008)).

or a variance knows that the code does not permit its use by right; that is why it applies. St. John acknowledged no more. Its letter said the grotto was "not directly permitted." J.A. 8; *see* Pet. App. 5a, 27a. If that knowledge makes a burden self-imposed, every claimant that subsection (a)(2)(C) reaches has burdened itself. A reading that leaves part of the statute "inoperative" is disfavored.[64]

Nothing in RLUIPA makes a claimant's expectations relevant, as Petitioner explains. Pet. Br. 42–44. But even the lower-court cases that consider them do not support the decision below. Those cases address claimants who acquired land with no reasonable expectation of using it for religious purposes. In *Andon*, a congregation signed a contingent lease on property that had not met setback requirements for at least 14 years, and the zoning administrator said the variance would be denied before the application was even filed.[65] The congregation thus "assumed the risk of an unfavorable decision."[66] *Petra* and *Canaan* involved similar facts.[67] The principle those courts applied protects "a plaintiff's reasonable expectation to use real

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[64] *Corley*, 556 U.S. at 314 (quoting *Hibbs*, 542 U.S. at 101).
[65] *Andon*, 813 F.3d at 515.
[66] *Id.*
[67] *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 847–48, 851 (7th Cir. 2007) (church that "had no reasonable expectation of obtaining a permit" and bought the property outright "after it knew that the permit would be denied" thereby "assumed the risk"); *Canaan*, 29 F.4th at 194–95 (contingent purchase of property that the master plan excluded from sewer service).

property for religious purposes."[68] St. John's expectation was not only reasonable. It was realized when the Board approved its grotto. Pet. App. 8a. And the Sixth Circuit has framed the factor as a point about process. When a claimant has "good reason to know in advance that its proposed usage will be subject to an onerous review process, the burdens of that process are not likely to count as substantial . . . ."[69] Whatever its merit, *see* Pet. Br. 42–44, that principle concerns the cost of a process, not a prohibition.

St. John's facts are the opposite of *Andon*'s. Its church has stood on the property since before Park Hills adopted its zoning code, and its status as a lawful nonconforming use is undisputed. Pet. App. 48a & n.3; *see id.* at 33a (Thompson, J., dissenting). St. John did not acquire land it had been told it could not use. It leased the parcel in 2016 and applied in 2021. J.A. 7, 125. And it won. After a public hearing, the Board approved the grotto, 4–1. Pet. App. 4a, 8a. Only then did St. John take title, as the Board's condition required. *Id.* at 8a–9a & n.6. The trial court affirmed, observing that Amsterdam Road "still meets the definition" of an arterial street and that the church was "grandfathered in." *Id.* at 59a. An expectation honored by both the Board and the trial court was, at the least, reasonable. The decision below turns a successful application into proof of forfeiture.

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[68] *Andon*, 813 F.3d at 515.
[69] *Catholic Healthcare*, 82 F.4th at 449.

Respondents' notice rule is a rule in search of a statute. Respondents find it first in the word "impose[d]." *See* Br. in Opp. 23–24. But that verb's subject is the government, not the claimant that asks permission. 42 U.S.C. § 2000cc(a)(1); *see* Pet. Br. 42–43. So respondents borrow a notice rule from the Takings Clause, likening St. John's knowledge of the ordinance to the "investment-backed expectations" that inform whether a regulation effects a taking.[70] Had RLUIPA contained one, respondents would not have needed to borrow it. Petitioner shows that Congress never linked the two. Pet. Br. 43–44. The borrowing also fails on its own terms, for four reasons.

First, the two provisions ask different questions. The Takings Clause does not forbid the government to regulate property; it requires payment when regulation goes too far. It is "designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking."[71] RLUIPA asks whether the government may impose the burden at all. 42 U.S.C. § 2000cc(a)(1). A doctrine that "presupposes that the government has acted in pursuit of a valid public purpose"[72] asks only whether the owner must be paid. It cannot tell a court whether the government must justify its action in the first

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[70] *See* Br. in Opp. 23–24 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

[71] *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 315 (1987).

[72] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

place, which is the only question RLUIPA's threshold asks. Second, the doctrines measure different things. Investment-backed expectations measure economic loss. RLUIPA measures the burden on religious exercise, which Congress defined without regard to whether the exercise is "compelled by, or central to" a faith, let alone whether it is profitable. 42 U.S.C. § 2000cc-5(7)(A). A grotto is not an investment, and its builders' expectations are not the measure of their devotion.

Third, the methods are opposites. *Penn Central* describes its own inquiry as "essentially ad hoc" and "factual."[73] RLUIPA prescribes a structured inquiry and assigns the burden of persuasion on each element. 42 U.S.C. § 2000cc-2(b). Importing an ad hoc factor into that structure would put back what Congress took out. Fourth, this Court has already refused to carry a test across the line between provisions that ask different questions. In *Lingle*, it held that a formula drawn from due-process cases "has no proper place in our takings jurisprudence."[74] The same discipline applies here, and with greater force, because the Act's sponsors told courts where to find the meaning of "substantial burden," and they pointed to "the Supreme Court's articulation of the concept of substantial burden or religious exercise," not to its takings cases. Joint Statement at S7776.

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[73] *Penn Cent.*, 438 U.S. at 124.
[74] *Lingle*, 544 U.S. at 540.

RLUIPA does provide a cure, but the cure is the government's to give. A government "may avoid the preemptive force" of the Act by changing the policy, by exempting the burdened exercise, or by "any other means that eliminates the substantial burden." 42 U.S.C. § 2000cc-3(e). The Act does not "relieve religious institutions from applying for variances, special permits or exceptions."[75] Congress expected the government to adjust its rules. It did not expect the claimant to forfeit its exercise by asking.

Nor may St. John's willingness to compromise be held against it. The court below noted St. John's concession that in 2021 it "voluntarily" submitted an application for a grotto smaller than it first intended. Pet. App. 27a. But scaling back a proposal is not a confession that less will do; it is what the application process invites. And St. John scaled back before the Board ruled, so the grotto the Board approved, and the decision below barred, was already the smaller one.

III. The Rule Is Limited and Workable, and It Protects Every Faith.

A. RLUIPA is not land-use immunity.

As RLUIPA's sponsors explained, the Act "does not provide religious institutions with immunity from land use regulation."[76] The rule keeps every safeguard Congress built. The claimant must still prove a

[75] Joint Statement at S7776.
[76] Joint Statement at S7776.

substantial burden on a sincere religious exercise. *See* 42 U.S.C. § 2000cc-2(b). Not every project qualifies. A gymnasium used only for sports is not religious exercise, and denying more office space does not burden religious exercise.[77] Trivial burdens do not count. *See supra* Part I.A. And even a substantial burden stands if the government proves that it is the least restrictive means of furthering a compelling interest. 42 U.S.C. § 2000cc(a)(1).

The sponsors also described, in a sentence no enacted provision tracks, where an accommodation enters the analysis, and it is not where the court below put it. "In any case in which the government provides prima facie evidence that it has made, or has offered in writing to make, a specific accommodation to relieve such a substantial burden, the claimant has the burden of persuasion that the proposed accommodation is either unreasonable or ineffective in relieving the substantial burden."[78] That sequence begins with a substantial burden and an offer from the government.

Only then must the claimant show that the offer falls short. The court below never reached that stage; it instead used a hypothetical smaller grotto to defeat St. John's claim at the threshold. Pet. App. 25a.

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[77] *See Westchester Day Sch.*, 504 F.3d at 347–48 (citing *Westchester Day Sch.*, 386 F.3d at 189).

[78] Joint Statement at S7776.

The government may still remove the burden by any of the means Congress listed. 42 U.S.C. § 2000cc-3(e). What it may not do is forbid the exercise, then make the claimant prove that less will not do.

B. Courts already administer this framework.

The test that follows a burden finding is a familiar one. RLUIPA applies RFRA's test, *see supra* Part I.C, and Congress called it "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[79] Courts apply it not in the abstract, but to "the particular claimant."[80] And they reject "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."[81]

The floodgates objection is that same rejoinder, and experience has not borne it out. In RLUIPA's first twenty years, the Department of Justice opened 485 land-use matters and filed just 25 land-use lawsuits.[82] More than two-thirds of the Department's investigations ended with local governments modifying their ordinances or taking other corrective action.[83] That is

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[79] *O Centro*, 546 U.S. at 436 (quoting 42 U.S.C. § 2000bb(a)(5)).
[80] *Holt*, 574 U.S. at 363 (quoting *Hobby Lobby*, 573 U.S. at 726).
[81] *O Centro*, 546 U.S. at 436; *see Holt*, 574 U.S. at 368.
[82] U.S. Dep't of Just., Civ. Rts. Div., *Report on the Twentieth Anniversary of the Religious Land Use and Institutionalized Persons Act* 12 (2020) [hereinafter DOJ Report].
[83] *Id.*

the cure RLUIPA leaves to governments, and governments have used it.[84]

Nor does the rule invite pretext. The claimant must still prove that its exercise is sincere, and "the scope of RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims."[85] In *Cutter*, the Court upheld RLUIPA's prison provision against a facial challenge, and as it later explained, "[n]othing in our opinion suggested that courts were not up to the task."[86]

C. The substitution rule falls hardest on less familiar faiths.

Smith itself acknowledged that leaving accommodation to the political process disadvantages "those religious practices that are not widely engaged in."[87] Land use bears that out. RLUIPA's sponsors reported "a widespread pattern of discrimination against churches as compared to secular places of assembly, and of discrimination against small and unfamiliar denominations as compared to larger and more familiar ones."[88] The numbers tell the same story. Jewish and Muslim communities make up about 3% of the population, yet they accounted for 33% of the Department of Justice's land-use investigations; Buddhist

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[84] *See* 42 U.S.C. § 2000cc-3(e).
[85] *Hobby Lobby*, 573 U.S. at 718.
[86] *O Centro*, 546 U.S. at 436; *see Cutter*, 544 U.S. at 725.
[87] 494 U.S. at 890.
[88] Joint Statement at S7775.

and Hindu communities, about 1.5%, accounted for 6.6%.[89]

A substitution rule makes a court the judge of how much a faith needs, the judgment RLUIPA withholds. *See* 42 U.S.C. § 2000cc-5(7)(A). Courts lack "comparative expertise when it comes to religious teachings, perhaps especially the teachings of less familiar religions."[90] And the less familiar the practice, the more adequate a substitute will seem. A smaller shrine may look sufficient to a court unfamiliar with Marian devotion. So may a smaller baptistery, prayer garden, or mikveh. Unfamiliarity need not mean blindness. In 1940, Franz Werfel, a Jewish writer fleeing the Nazis, took refuge at Lourdes and vowed that if he escaped he would tell Bernadette's story. He kept that vow in *The Song of Bernadette*.[91] One need not share a devotion to recognize that a place can carry it. RLUIPA asks no more of courts.

CONCLUSION

The Court should hold that a land-use regulation prohibiting a religious institution's proposed religious use of its own property substantially burdens religious exercise, whether or not the institution could build a smaller or different project elsewhere, and whether or not the institution knew the use required approval. The government may then justify that

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[89] DOJ Report at 12.

[90] *Yellowbear*, 741 F.3d at 54.

[91] *See* Franz Werfel, *The Song of Bernadette*, A Personal Preface (Ludwig Lewisohn trans., 1942).

burden at strict scrutiny, or eliminate it. *See* 42 U.S.C. § 2000cc-3(e). The judgment should be vacated, and the case remanded for further proceedings.

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